

COMINCO AMERICAN INC.

IBLA 76-361

Decided September 1, 1976

Appeal from decision of the Montana State Office, Bureau of Land Management, approving modification of phosphate lease Montana 011033 subject to special readjustment stipulations.

Affirmed.

1. Mineral Leasing Act: Rentals -- Phosphate Leasing and Permits:
Rentals

The Bureau of Land Management is authorized by regulation 43 CFR 3524.1-4(a)(2)(i) to impose a reasonable bonus per acre as a condition to modifying a phosphate lease by adding land to it noncompetitively.

2. Environmental Quality: Generally -- Mineral Leasing Act:
Environment -- Phosphate Leases and Permits: Generally

It is proper to include environmental protection stipulations in a phosphate lease even though the stipulations apply to privately owned surface lands overlying the federally reserved mineral estate under lease or to privately owned lands used in conjunction with the lease.

APPEARANCES: R. K. Barcus, Senior Vice President, Cominco American Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Cominco American Inc. has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated November 7, 1975, approving modification of appellant's phosphate lease Montana 011033, upon the condition that appellant consent to special readjustment stipulations. On November 1, 1953, the subject phosphate lease was issued to appellant's predecessor in interest. Section 3(e) of the lease provided that:

The lessor expressly reserves * * * [t]he right reasonably to readjust and fix the royalties payable hereunder and other terms and conditions, * * * at the end of 20 years * * * but in case the lessee be dissatisfied with the rate of royalty or other terms and conditions so fixed, he shall be entitled to surrender this lease * * *.

The lease became subject to Departmental readjustment as of November 1, 1973.

On May 3, 1973, appellant requested that the existing lease be modified by the addition of a 40-acre tract in the NE 1/4 NE 1/4 sec. 30, T. 10 N., R. 9 W., P.M., Powell County, Montana. This tract corners appellant's lease which embraces 299.71 acres in lots 3, 4, 5, and 6, S 1/2 NE 1/4, N 1/2 SE 1/4 sec. 20, T. 10 N., R. 9 W., P.M. The surface land covering the federal mineral estate under lease in section 20, as well as the surface of the 40-acre tract requested in section 30, is privately owned. Sections 19 and 29, which abut the federal estates, are privately owned, both surface and subsurface, and are under lease to appellant for phosphate development.

On October 1, 1973, appellant filed a letter stating it wished to retain the lease and requesting to be advised of any readjustments made. It appears that the two petitions were thereafter considered together. However, the decision of November 7, 1975, deals only with the modification of the lease. In it the BLM found that the 40-acre tract lacked sufficient reserves to warrant independent development and that development of the reserves by appellant would result in the conservation of natural resources. Accordingly, appellant's petition for modification was approved. See 43 CFR 3524.1-4. However, the BLM approval was not without qualification. A modified lease was to be granted to appellant upon compliance with the following readjustments:

1. Submit advance rental for the additional land at \$ 1 per acre, \$ 40 for the lease year November 1, 1975, to October 31, 1976.

2. Submit a bonus payment for the additional land at \$ 10 per acre, \$ 400.
3. Execute and return to this office all the copies (3) of the attached modified phosphate lease.
4. Execute and return to this office all the copies (3) of the attached * * * Stipulations which will become a part of the modified lease and will affect all the lands in the lease.

A General Stipulation requires the following:

Protection of the Surface, Natural Resources and Improvements:

GENERALLY:

The lessee agrees to take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) causing or contributing to soil erosion or damaging any forage and timber growth thereon; (2) polluting the waters of springs, streams, wells, or reservoirs; (3) damaging crops, including forage, timber, or improvements of a surface owner; or (4) damaging range improvements whether owned by the United States or by its grazing permittees or lessees; and upon any partial or total relinquishment or the cancellation or expiration of this lease, or at any other time prior thereto when required by the lessor and to the extent deemed necessary by the lessor, to fill any sump holes, ditches and other excavations, remove or cover all debris, and, so far as reasonably possible, restore the surface of the leased land to its former condition, including the removal of structures as and if required. The lessor may prescribe the steps to be taken and restoration to be made with respect to lands of the United States and improvements thereon.

Special Stipulations require that:

1. A culvert should be installed in Warm Springs Creek where it passes through the mine yard. If culvert installation is impractical because of flow volume, rip-rap both banks and provide adequate berm and grading to prevent sediment laden runoff from the mine yard from entering the stream. No additional dumping of mine waste or other material shall be permitted in the stream.

2. Rock revetment should be placed along the stream where the road fill extends to the stream edge. Overburden from mining (particles larger than 1/4 [cub.] yd) and free of any fine dirt, sand, gravel, etc., might be used.
3. Road cuts and fills and other disturbed areas not being intensively used should be revegetated with fast growing shrubs/trees/grasses, i.e. willow along the stream. All new surface disturbing operations should be designed with eventual reclamation in mind. To that end, all topsoil or soil material should be removed from such areas and stockpiled.
4. Roadways, the mine yard, and all disturbed areas that are used regularly should be surfaced with gravel or crushed rock. Material should be selected with physical properties which will reduce dust production and reduce or prevent surface pooling or flow of water. Dust control measures should be taken on these areas.
5. Conduct water quality studies of Warm Springs Creek in an attempt to predict, with greater certainty than is now possible, what effects, if any, mining will have on the stream and the Clark Fork River. Coordinate this effort with the State Department of Health and Environmental Science and consider lessee participation either directly or financially.
6. Off-road vehicle use should be minimized (and should be eliminated in winter range areas especially during winter use periods by game).
7. Provide fences and warning signs at all underground openings.

In an effort to determine what readjustments should be applied to appellant's lease and whether the additional 40-acre tract should be added to the leasehold, the BLM developed a Technical Report and an Environmental Analysis Record (EAR) for the general area. The Special Stipulations required in the BLM decision represent recommended mitigating measures proposed in these reports to diminish adverse environmental impacts, particularly to Warm Springs Creek, caused by appellant's mineral development activities.

The BLM reports concluded that no surface disturbance would occur on the leased tracts because the phosphate resources are being removed from an underground mining operation which originates at a drift portal in section 19 near Warm Springs Creek. Some openings

may extend to the surface for purposes of providing ventilation to the underground workings, but the impact on the surface would be minor. The main environmental impact expected to occur is at the mine yard and along the haul road which are situated along Warm Springs Creek. The mine yard either presently contains or has under construction a shophouse, compressor house, bathing house, office quarters, ore bins and other improvements. In addition, a haul road adjoins the yard and follows Warm Springs Creek in a southwesterly direction until it connects with a main highway.

The BLM reports state that lands in the general area, both federal and private, are devoted to considerable grazing activity, and that as far as noncommercial usage, the surrounding lands are a significant wildlife habitat and are used for numerous recreational pursuits. One-half mile southwest of the mine yard, the creek flows over Warm Springs Falls and then follows a meandering course to its confluence with the Clark Fork River. The Hoodoo Planning Unit Management Framework Plan (MFP) indicates that land in sec. 25, T. 10 N., R. 10 W., P.M., on which Warm Springs Falls are located, is to be acquired by the Department of the Interior for the purposes of natural resource preservation and recreational development. The Department also intends to acquire a permanent easement along the Warm Springs Creek road to provide access to the area. The MFP additionally indicates that part of the national resource land in sec. 24, T. 10 N., R. 10 W., P.M., is identified as crucial winter game range for mule deer and elk.

The BLM reports state that vehicle traffic, tramming, dumping and loading of ore at the mine yard, combined with surface water runoff over waste material, contribute large amounts of sediment and phosphorus to the creek, and that appellant has made no attempts to preserve water quality or stream bed environment. Furthermore, maintenance, reconstruction and use of the haul road by appellant has added to the sediment load in Warm Springs Creek. Several areas along the haul road have been widened using mine waste, and excess material has been bladed into the creek.

The BLM noted that the Clark Fork River, into which the creek empties, is a major trout stream and annually suffers from severe "blooms" or green filamentous algae. Nitrogen and phosphorus are the two elements needed to trigger this outburst of algae growth, and the BLM suspects that appellant's operation is contributing to the damage. Furthermore, the BLM fears that continued uncontrolled development by appellant will adversely affect the aesthetic and recreational values associated with Warm Springs Falls, soon to be acquired by the Federal Government.

In its statement of reasons, appellant presents a number of arguments. First of all it maintains that a bonus payment of \$ 10

per acre for the additional 40-acre tract is excessive. Appellant states that:

In view of the fact that no bonus payments were issued for the original lease, that Appellant has not paid bonus payments for prior leases obtained from the Department, and is not aware that bonus payments of this magnitude have been charged and paid for in that area for like leases, it would appear not consistent and excessive for the Department to now charge \$ 10 per acre * * *.

Appellant next points out that the surface areas of the lands covered by the original lease, as well as the surface of the proposed tract to be added by modification of the lease, are owned by private parties and are therefore not the property of the United States. Appellant argues that in light of this situation, the Department cannot compel appellant to agree to stipulations which might cause appellant to be in violation of rights reserved to the surface owners. Appellant further argues that with regard to the mine yard and hauling road operations which take place on lands where both the surface and subsurface estates are not in federal ownership:

The Department acting through the Bureau of Land Management exceeds its authority by imposing special conditions upon a private mining operation conducted upon fee owned property which is separate and apart by approximately three-quarters (3/4) of a mile from the properties covered by the lease here in question.

Finally, appellant adds that the Special Stipulations are overly burdensome, impractical to an orderly mining operation, and lend little to the improvement of the environment. Appellant does not contest application of the general provision of the added stipulations, but requests that a lease be granted as modified by the addition of the cornering 40-acre tract, and not subject to the specifically enumerated items one through seven of the proposed Special Stipulations.

The Board finds that appellant's arguments lack merit and accordingly we affirm the decision of the BLM. We shall respond to appellant's arguments in the order in which they are presented.

[1] First of all, contrary to appellant's statement, bonus payments were tendered with respect to the original lease. In 1953, appellant's predecessor in interest offered and paid a bonus of \$ 5.25 per acre on the original lease. At that time the recommended minimum bid acceptable by the Department was \$ 5 per acre. Under present Department regulations, a modification of

an existing lease through noncompetitive procedures requires "a bonus of not less than \$ 1 per acre, a minimum royalty, and such other terms and conditions as may be determined at the time the lease offer is made." 43 CFR 3524.1-4(a)(2)(i). Therefore, we find that the BLM's bonus payment requirement is both authorized and has precedent with regard to the subject lease. We also find that, in light of the passage of time between 1953 and the present, the requirement of a bonus payment of \$ 10 per acre is reasonable.

[2] Next we reach appellant's argument that it is improper for the Department to impose protective conditions with respect to the surface areas not owned by the Federal government. Initially we note that the BLM contacted the surface owners with respect to the proposed conditions and there is no indication in the record, nor does appellant present any evidence, suggesting that the surface owners objected to the proposed action of the BLM.

Even in the absence of surface owner concurrence, the Department of the Interior has included environmental protection stipulations on mineral leases where the surface of the leased land was not owned by the Federal Government. ^{1/} In Montana Power Co., 72 I.D. 518 (1965), the appellant's coal lease came under review by the Department for its second 20-year extension, and was approved subject to a surface restoration clause identical to the General Stipulation imposed in this case. Id. at 521 n. 3. The appellant argued that the surface owner had no interest in restoring the land and had, in fact, waived its right to surface preservation. Id. at 520, 521. The Secretary of the Interior responded to this argument as follows:

[T]he same clause has been a part of all coal leases issued since March 1951, without, so far as we are aware, causing any particular controversy in its application. * * * The undesirable after effects of the single-minded exploration of mineral resources are well known and the clause is merely a reasonable attempt to achieve some balance between the competing uses of land now and in the future.

* * * The lease has been in existence for 40 years and in starting on a new 20-year extension its terms must look to the possibility of changed circumstances in the future.

^{1/} Departmental regulations 43 CFR Part 23 impose comprehensive environmental protection requirements for mineral leasing activities for resources other than oil and gas. These regulations, however, do not cover "minerals underlying lands, the surface of which is not owned by the U.S. Government." 43 CFR 23.2(b).

* * * [Appellant] contends that the restoration provision should be limited to acreage the surface of which is owned by the United States. Although it is true that the United States has a greater interest in its own lands, it also has a substantial concern with lands of others in which it has reserved the minerals * * *.

Id. at 520-21. The Secretary came to this final conclusion, despite the surface owner's waiver, on the basis that future generations acquiring ownership of the surface estate might have an attitude different from that of the present owner and were entitled to protection of the lands. In line with this decision, the Board concludes that the BLM stipulations imposing conditions upon the use of the surface estates overlying the federally reserved minerals are proper. 2/

We reject appellant's argument that the Department has no authority for conditioning the modification and readjustment of the subject lease with environmental stipulations which apply to lands which do not belong to the Federal Government. Thus, in Grindstone Butte Project, 24 IBLA 49, 52 n. 3 (1976), the Board permitted the BLM to impose environmental protection requirements for portions of an irrigation right-of-way that were not located on federal lands.

In a recent case upholding the authority of Congress to preserve and protect wild free-roaming horses and burros on public lands, the Supreme Court recognized that the authority to promulgate under the Property Clause of the United States Constitution, U.S. Const. Art IV, § 3, cl. 2, is broad enough to reach beyond federal property limits and may have some effect on private lands not otherwise under federal control. Kleppe v. New Mexico, 426 U.S. 529 (1976); 44 LW 4878 (1976).

The Department's concern with the effect on privately owned lands of activities it authorizes on federally owned lands has been made manifest in the recently issued regulation pertaining to surface management of federal coal resources. 43 CFR Subpart 3041, 41 FR 20252 (May 17, 1976). The regulation first states that the purpose of the regulation is to manage federal coal resources regardless of surface ownership "to minimize so far as practicable the adverse social, economic and environmental effects of such operations." 43 CFR 3041.0-1(a).

2/ While the surface owner in Montana Power Co. was indifferent with respect to surface restoration of its property, the case does not reflect disapproval of such a condition being imposed on the property. Accordingly, in that case, as with the present case, the appellants had no grounds for objecting to the stipulations on behalf of the surface owners.

It then directs the authorized officer to "make an environmental analysis of [coal development] upon the resources of the area and its environment * * *" (Id. § 3041.1(a)) and to evaluate the impact of coal development and leasing on land uses, resources and land management programs in or adjacent to the area (Id. § 3041.2(a)(2)). It also specifically requires that:

The operator shall utilize the best practicable commercially available technique to minimize control or prevent disturbances of the prevailing quality, quantity and flow of water in surface and ground water systems, and of the prevailing erosion and deposition conditions at the mine site and in affected offsite areas, both during and after coal mining operations and reclamation * * *. Id. § 3041.2-2(f)(7).

While this regulation pertains solely to coal operations, it does establish the Secretary's concern with offsite effects of operations undertaken under a federal lease on nonfederal lands and resources.

We also note the recent amendment to the regulation pertaining to leasing lands for phosphate and other leasable minerals. 43 CFR Subpart 3521, 41 FR 18845 (May 7, 1976). An applicant for a lease is required to submit:

A map, or maps, as may be available from State or Federal sources, which shows the topography of the land applied for, on which the applicant shall show physical features and natural drainage patterns and existing roads, vehicular trails, and utility systems; the location of any proposed development or mining operations and facilities incidental thereto, including the appropriate locations and areal extent of the areas to be used for pits, overburden, and tailings; and the location of water sources or other resources which may be used in the proposed operations or facilities incidental thereto.

Id. § 3521.1-1(b)(2); and a narrative statement, including:

* * * * *

(iii) The relationship, if any, between the mining operations anticipated on the lands applied for and existing or planned mining operations, or facilities incidental thereto, on adjacent Federal or non-Federal lands;

(iv) A brief description, including suitable maps or aerial photographs as appropriate, of the

existing land use within and adjacent to the lands applied for, and of known geologic, visual, cultural, or archaeological features, and the known habitat of fish and wildlife, particularly threatened and endangered species, that may be affected by the proposed or reasonably anticipated exploration or mining operations; and

(v) A brief description of the proposed measures to be taken to prevent or control fire, soil erosion, pollution of surface and ground water, damage to fish and wildlife or other natural resources, air and noise pollution, and hazards to public health and safety; to reclaim the surface; and to otherwise meet applicable laws and regulations which the applicant wishes to have considered by the authorized officer.

Id. § 3521.1-1(b)(3).

Here again the Secretary has demonstrated his concern with the consequences of operations on federal lands upon nonfederal lands.

We still must determine whether the proposed conditions are reasonable. Appellant argues that the Special Stipulations will require burdensome costs, will interfere with an orderly mining operation, and will not appreciably enhance the quality of the environment. We are not persuaded by appellant's allegations. First of all, appellant has not demonstrated that the stipulations are either inconsistent with or will tend to unreasonably encumber its mining operation. As for enhancement of the environment, it is clear that the stipulations are aimed at preserving the water quality of Warm Springs Creek and Warm Springs Falls, 3/ protecting

3/ Pursuant to the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251, 1314(j) (Supp. IV 1974), the Department has the responsibility to cooperate with other federal and state agencies to prevent water pollution. In this case, the BLM contacted the Montana State Department of Health and Environmental Science and has required appellant to coordinate its activities with this agency. Furthermore, while the Federal Government has not as yet acquired the Warm Springs Falls property, it still has an interest in seeking environmental protection of that area, as well as protection for the national resource lands used as a wildlife habitat. See United States v. Alford, 274 U.S. 264, 267 (1927), where the Supreme Court held that the Federal Government could prohibit the doing of acts upon privately owned lands when such acts imperiled publicly owned forests.

wildlife habitat, and safeguarding individuals from the hazards of underground openings. These goals are environmentally beneficial and are in line with the Secretary's directive that the BLM administer its programs in a manner which attains:

* * * the widest range of beneficial uses of the environment (including the land, water, flora, fauna, and other environmental elements) without undue environmental degradation, risk to health or safety, or other undesirable consequences.

43 CFR 1725.3-2(a).

If the appellant is dissatisfied with the new conditions of the readjusted lease, it is not without recourse since by the terms of the agreement appellant is entitled to "surrender this lease," thereby "defederalizing" its mining operations. However, if appellant chooses to receive the benefits of leasing federal land, it must also assume the burdens, one of which is responsibility for mitigating adverse environmental impacts resulting from the exploitation of federally reserved minerals.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Frederick Fishman
Administrative Judge

